U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 September 2007

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In the Matter of:

E.F.,
Claimant,

v. **Case No. 2005-BLA-05896**

WEBSTER COUNTY COAL CORP. / MAPCO, INC.
Employer / Carrier, and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest

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Appearances:

Ellen S. Bowles, Esq., Pollard & Bowles PLLC,
Louisville, KY
For Claimant

Lance Yeager, Esq., Ferreri & Fogle PLLC,
Louisville, KY
For Employer

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901, *et seq.* (hereafter "the Act") filed by Claimant E.F. ("Claimant") on September 7, 2001. The instant claim is the third claim filed by Claimant. The putative responsible operator is Webster County Coal Corporation ("Employer"), which is self-insured through Mapco, Inc./Alliance Coal. The hearing in this matter was initially held before the Honorable Daniel J. Roketenetz. The undersigned administrative law judge was assigned to hear the matter in light of Judge Roketenetz's Order of Remand with instructions that the District Director provide

Claimant with a complete and credible pulmonary examination in accordance with section 725.406(a) of Title 20 of the Code of Federal Regulations.[1]

Twenty C.F.R. Part 718 applies to this claim, as it was filed after March 31, 1980, and the regulations amended as of December 20, 2000 are also applicable, as it was filed after January 19, 2001. 20 C.F.R. § 718.2. In *National Mining Assn. v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit upheld the majority of these amended regulations. The Department of Labor amended the regulations on December 15, 2003 for the purpose of complying with the court's ruling. 68 Fed. Reg. 69929 (Dec. 15, 2003).

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all evidence admitted and arguments submitted by the parties. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

Pursuant to the Federal Coal Mine Health and Safety Act of 1969, Claimant filed his first claim for benefits on November 28, 1972.[2] (DX 1).[3] The Social Security Administration denied this claim on August 1, 1973, on the grounds that it did not establish that Claimant "[met] the disability requirements of the law." *Id.* That is, Claimant failed to establish that he had contracted "pneumoconiosis or a severely disabling chronic lung impairment that could be presumed to be due to pneumoconiosis." *Id.* On October 11, 1978, this claim was reviewed in light of changes to the law, but was again denied by the Social Security Administration for the same reason. *Id.* On appeal to the Department of Labor, a final denial was issued on February 22, 1980, on the grounds that evidence: (1) did not establish that Claimant suffered from pneumoconiosis and (2) did not show that Claimant was totally disabled by the disease. *Id.* The record indicates no further appeals based on Claimant's initial application for benefits.

Under the Black Lung Benefits Act, Claimant filed his second claim for benefits on September 12, 1997. (DX 2). Dr. Valentino S. Simpao conducted an examination on September 30, 1997. *Id.* The District Director denied this claim on December 12, 1997, and stated that the submitted evidence: (1) did not establish that Claimant suffered from pneumoconiosis, (2) did not establish that the disease was caused at least in part by coal mine work, and (3) did not show that the disease had rendered claimant totally disabled. *Id.* Claimant issued no further appeal.

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[1] All "section" and "part" references herein refer to Title 20 of the Code of Federal Regulations unless otherwise indicated.

[2] The Black Lung Benefits Program was first administered by the Social Security Administration under Title IV of the Federal Coal Mine Health and Safety Act of 1969 ("the Act"). Pub. L. No. 91-173 (1969) (codified as amended at 30 U.S.C. §901 *et seq.*). Over the subsequent years, the Act was amended by the Black Lung Benefits Act of 1972, the Black Lung Benefits Reform Act of 1977, the Black Lung Benefits Revenue Act of 1977, the Black Lung Benefits Revenue Act of 1981, and the Black Lung Benefits Amendments of 1981. Of moment to the instant case, the amendments of 1972 and 1977 respectively granted the Department of Labor jurisdiction over black lung benefits cases and allowed miners to seek DOL review of previous applications that had been denied by the Social Security Administration. *See* Pub. L. No. 92-303 (1972), Pub. L. No. 95-239 (1978)(codified as amended at 30 U.S.C. §901 *et seq.*). Other pertinent amendments are discussed in 20 C.F.R. § 725.1.

[3] Director's Exhibits, Claimant's Exhibits, and Employer's Exhibits are referenced as "DX," CX," and "EX," respectively, followed by the exhibit number. References to the hearing transcript appear as "Tr." followed by the page number.

Claimant filed the instant claim on September 7, 2001. (DX 4). An examination was conducted before Dr. Valentino S. Simpao on November 13, 2001. (DX 13, CX1, CX 3). The District Director issued an August 15, 2002, Schedule for the Submission of Additional Evidence, which indicated that Claimant would not be entitled to benefits based on the initially submitted evidence and that Webster County Coal Corporation was the responsible operator liable for the payment of benefits. (DX 18). The Schedule indicated that the preliminary evidence established that: (1) Claimant worked as a coal miner for 18.33 years, (2) Claimant had pneumoconiosis, and (3) Claimant's pneumoconiosis was caused at least in part by exposure to coal mine dust. *Id.* However, according to the Schedule, the evidence further indicated that the Claimant did not have a totally disabling respiratory or pulmonary impairment and, consequently, that no totally disabling impairment was caused by pneumoconiosis. *Id.* The District Director issued a Proposed Decision and Order on June 11, 2003, denying benefits for the same reasons. (DX 19). On June 20, 2003, Claimant requested a hearing before the Office of Administrative Law Judges. (DX 20). On September 5, 2003, the case was referred for a hearing, but was remanded by Administrative Law Judge Daniel J. Roketenetz on August 26, 2004, for the conduct of a complete medical examination in compliance with sections 718.204 and 725.406, because Dr. Simpao's "total disability" diagnosis had failed to credibly discuss all evidence contributing to such a determination. (DX 23). The District Director requested a more detailed report and diagnosis, to which Dr. Simpao responded in a letter dated March 31, 2005. (DX 23). On May 18, 2005, the case was again transmitted to the Office of Administrative Law Judges for a formal hearing.

A formal hearing in the above-captioned matter was held on November 1, 2006, in Madisonville, Kentucky before the undersigned administrative law judge. At the hearing, Director's Exhibits 1 through 27 ("DX 1" – "DX 27") were admitted into evidence. (Tr. 5-6). Claimant's Exhibits 1 through 4 ("CX 1" – "CX 4") and Employer's Exhibits 1 and 2 ("EX 1," "EX 2") were also admitted. (Tr. 8-12). Claimant was the only witness to testify. Counsel for the Director was not present. (Tr. 4). At the conclusion of the proceedings, the record was closed, but the parties were permitted to submit briefs or written closing arguments within 30 days of receipt of the transcript.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues / Stipulation

The issues initially before me were: the timeliness of the claim; the determination of Claimant's status as a "miner;" the Claimant's employment as a miner after December 31, 1969; the length of coal mine employment; the existence of pneumoconiosis; its causal relationship with coal mine employment; total disability; causation of total disability; the status of Employer as the "Responsible Operator;" and Employer's capability to pay benefits. Employer withdrew issues number one (Timeliness); two (Miner); and three (Post 1969 Employment). (Tr. 6).

At the hearing, the parties stipulated to 18 years of coal mine employment, and Employer stipulated that if the Black Lung Disability Trust fund was determined to be not responsible, Employer would be the responsible operator. (Tr. 7). The remaining issues for resolution are:

the existence of pneumoconiosis, its causal relationship to coal mine employment, total disability, and the causation of total disability. *Id.*

Although not raised as an issue by either party, this is a subsequent claim governed by 20 C.F.R. §725.309. That issue was not, however, listed on the transmittal form. It was not discussed in the briefs filed by the parties either. It was also not raised by the Employer before the district director.

In *Stamper v. Westerman Coal Co.*, BRB No. 05-0946 BLA at 6, (Jul. 26, 2006) (unpub.) (per curiam), the Board vacated and remanded a matter back to me with instructions that I should determine whether the claim should proceed under Section 725.309. I mentioned in my decision that a search of this office's Case Tracking System showed three other claims, but that the issue was not contested on the CM-1025 transmittal form or at the hearing by the employer, and the employer did not address the issue in its posthearing brief. Both the Director and I concluded that the employer had waived the issue, but the Board relied upon the employer's written controversion to the District Director's Proposed Decision and Order awarding benefits, in which the employer stated it contested whether the claimant had established a change in condition. *Id*. Based on this, the Board required that, in view of the apparent existence of previous claims, I determine whether the subsequent claim issue under section 725.309(d) was properly before me but, in doing so, essentially begged the question. *Id.* In accordance with *Stamper*, I am charged with the responsibility to ensure that the procedural record is complete and that all potential issues are addressed, even if the issues have not been raised, or have been abandoned, by the parties. Thus, to avoid the possibility of an unnecessary remand, I will consider the subsequent claims issue as properly contested prior to consideration of the claim on the merits.

New Medical Evidence

The new medical evidence submitted in connection with the current claim is listed below.

Two chest x-rays have been interpreted in connection with the instant claim, and the interpretations utilized the International Labour Office (ILO) Classification System and are in compliance with the regulatory standards. First, there was an additional interpretation of the September 30, 1997 x-ray that was taken during the DOL examination for the previous claim. Specifically, Employer submitted the interpretation by Dr. Bruce Broudy, a B-reader, of that x-ray as one of its two affirmative x-ray reports; in fact, it was the only affirmative x-ray report offered by Employer. Second, a chest x-ray taken on November 13, 2001, in connection with the DOL examination relating to the instant claim, was interpreted by the DOL examiner, Dr. Valentino Simpao. A rebuttal interpretation by Dr. Broudy was submitted on behalf of the Employer. The x-ray evidence is summarized in the table below.[4]

[4] As used herein, "BCR" refers to a board-certified radiologist and "B-Reader" refers to a physician certified by NIOSH to read x-rays. A list of B-Readers is available at www.oalj.dol.gov (NIOSH Certified B-Reader List).

Exhibit #	Date of X-Ray, Date of Reading	Physician	Qualifications B-Reader (B) / Board Cert. (BCR)	Film Quality	Reading
EX 1	09/30/1997[5]	B. Broudy	B	1	No parenchymal or pleural abnormalities consistent with pneumoconiosis.
CX 1 / DX 13	11/13/2001, Same	V. Simpao		1	Pneumoconiosis 1/0; Small opacities p/p, upper two right zones, mid left zone; no large opacities, no pleural abnormalities.
CX 2 / DX 13	11/13/2001, 12/17/2001	E.N. Sargent	B / BCR	1	Roentgenographic *quality* reading only.
EX 1	11/13/2001, 05/25/2004	B. Broudy	B	1	No parenchymal abnormalities / pleural abnormalities consistent with pneumoconiosis. No other abnormalities.

Dr. Simpao also performed pulmonary function tests on November 13, 2001. (DX 13, CX 3). Post-bronchodilator examination was not administered. *Id.* The results of the pulmonary function tests are summarized below.

Exhibit , Date of Test, Physician	Age / Height (in.)	Coop./ Comp. Noted	Bronchodilator (pre/post)	FEV1	FVC	MVV	FEV1/FVC Ratio
DX 13 / CX 3, 11/13/2001, V. Simpao	71 / 72 in.	Good coop., Good comp.	Pre (only):	3.10 (85% pred.)	4.68 (97% pred.)	69	66%

Pursuant to section 718.204(b)(2)(i), to establish total disability, a claimant must first show that his or her FEV1 value is equal to or less than the values set forth in the pertinent tables in 20 C.F.R. Part 718, Appendix B, relative to age, sex, and height. Additionally, the claimant's medical evidence must also establish qualifying FVC or MVV values or, alternatively, an FEV1/FVC ratio of less than 55%. 20 C.F.R. § 718.204(b)(2)(i)(A)-(C). Based on these results, only Claimant's MVV values qualify under the statute.

[5] Dr. Broudy's interpretation was not of record in the previous claim. (DX 2).

Also on November 13, 2001, Dr. Simpao performed an arterial blood gas study. (DX 13, CX 3). The results of the study – which was only taken at rest due to Claimant's unrelated physical difficulties (i.e., leg and knee weakness and history of myocardial infarction) – do not qualify under Part 718, Appendix C, and are summarized below.

Exhibit, Date of Test	Physician	Altitude (feet)	Resting (R) Exercise (E)	pCO2	pO2	Qualifies?
DX 13 / CX 3, 11/13/2001	V. Simpao	0 - 2999 ft.	R	44.6	91.8	No
			E			

Medical opinions were rendered by four physicians: (1) Dr. Valentino A. Simpao (DX 13, CX 1, CX 3 – CX 4) (DOL Examination), (2) Dr. E. Nicholas Sargent (DX 13, CX 2) (DOL Quality Re-Read), (3) Dr. Bruce Broudy (EX 1) (Employer's Initial), and (4) Dr. Jeff W. Selby (EX 2) (Employer's Initial).

(1) Dr. Valentino A. Simpao prepared two reports based on Claimant's November 13, 2001, examination. (DX 13, DX 23, CX 1, CX 3 – CX 4). The first was the form reports of the same date detailing his findings based on the DOL pulmonary examination. On March 31, 2005, he prepared a supplemental report in response to a DOL Order of Remand, which requested that Dr. Simpao elaborate and clarify his medical findings. (DX 23, CX 4). Dr. Simpao is a certified A-Reader.

In the initial November 13, 2001, form report, Dr. Simpao recorded Claimant's medical history, performed a physical examination, and reviewed test results. (DX 23, CX 4). Dr. Simpao listed Claimant's last coal mine employment as "mine superintendent" from 1971 to 1972, he listed a history of 21 years of underground employment, and he referenced Claimant's coal mine employment history form. (DX 5).[6] He noted that, although Claimant quit smoking in 1975, he smoked continuously for 30 years at the rate of approximately 75 cigars per week.[7] (DX 13, CX 3) Dr. Simpao stated that Claimant suffered from dyspnea after "exertion 'for [a] long time.'" *Id.* Additionally, the report notes that Claimant cannot sleep on his back and his cough produces thick gray sputum once weekly. *Id.* Dr. Simpao's report also recorded chest pain, but cited the inciting factor as "[Claimant experiencing] indigestion once in a while." *Id.*

Dr. Simpao made the following summary of diagnostic tests:

[6] The coal mine employment history form listed Claimant's employment for various coal mine employers as involving work underground in maintenance and as a machine operator at the face of the mine between September 1952 and March 1973. (DX 5).

[7] In various parts of the record, Claimant's smoking habit was reported to be either 75 or 100 cigars per week for 30 years.

- *Chest X-Ray*
  - Coal Worker's Pneumoconiosis Category 1/0
- *Pulmonary Functions Study*
  - "The FEV1/FVC ratio along with midflows are reduced. This test indicates small airway disease."
- *Arterial Blood Gas*
  - Normal Arterial Blood Gas
- *EKG*
  - Sinus bradycardia and left axis deviation.

Id. In the portion of the report (section D6) asking for "Cardiopulmonary Diagnosis (es): (And provide the basis (es) for your diagnosis (es))" he merely stated: "CWP 1/0." *Id.* When asked about the etiology and rationale (in section D7), Dr. Simpao's report asserted that multiple years of coal dust exposure was medically significant in Claimant's pulmonary impairment. *Id.* Under Impairment (section D8), Dr. Simpao categorized the severity as "mild impairment," but also listed "mild impairment" when asked the extent to which the cardiopulmonary diagnoses contributed to the impairment. *Id.* In a supplemental form, however, Dr. Simpao indicated that the basis of the pneumoconiosis 1/0 diagnosis was "findings on the chest x-ray, EKG, and pulmonary function test along with physical findings and symptomatology." *Id.* He further indicated that the Claimant had a mild impairment that was attributable to pneumoconiosis. *Id.* When asked whether the Claimant had the respiratory capacity to perform the work of a coal miner or comparable work in a dust free environment, he indicated "no" based upon "objective findings on the chest x-ray, EKG and pulmonary function test along with symptomatology and physical findings as noted in the report." *Id.*

In a response to Judge Roketenetz's Order of Remand – pursuant to which the District Director's office requested that Dr. Simpao clarify his findings with regard to the level of disability, the medical reasoning underlying a conclusion that Claimant was totally disabled, and the reasoning supporting a diagnosis of pneumoconiosis – Dr. Simpao submitted a supplemental letter dated March 31, 2005. (DX 23, CX 4). The body of the letter is quoted below in its entirety:

> I have reviewed [Claimant]'s examination performed on November 01, 2001. It is my medical opinion that [Claimant's?][8] 18 years of coal dust exposure is the significant contributing factor to his coal worker's pneumoconiosis. Smoking and his cardiac history have aggravated his pulmonary condition. [Claimant] is totally disabled due to his pulmonary and cardiac impairment. Unfortunately, there is no proven procedure to determine the degree these factors have influenced his pulmonary condition.

Id.

Of note, Dr. Simpao also examined Claimant in connection with his previous September 12, 1997, claim. (DX 2). That examination has not been designated by either party.

[8] In this portion of the letter, Dr. Simpao referenced a different individual but it appears that the reference was intended to be to the Claimant and was due to a typographical or technical error.

(2) Dr. Jeff W. Selby performed a review of portions of Claimant's medical history, including medical reports that are not in the record before me. (EX 2). Dr. Selby is a Board-certified pulmonologist and B-Reader. *Id.* Some segments of Dr. Selby's conclusions arise from medical evidence not contained within the record and will be viewed accordingly.

Dr. Selby reported that Claimant did not suffer from a pulmonary impairment as a result of coal mine dust exposure. (EX 2). His report further stated that Claimant had the respiratory and pulmonary capacity to perform any and all prior coal mine duties, including the duties he performed when his employment with the mine terminated in 1972. *Id.* It was Dr. Selby's opinion that any respiratory impairment claimant may suffer is more likely to have arisen as a result of his long and heavy inhalation of cigar smoke rather than his employment as a coal miner. *Id.* Finally, Dr. Selby noted that, though the record contains a reading of Claimant's pulmonary function test as abnormal, the American Thoracic Society guidelines would "recommend not using small airways values when the FVC, FEV1, [and] FEV1/FVC ratio are normal as in this case." *Id.*

Dr. Selby provided a summation of his report by recording that: "[Claimant] has normal lung function even over 25 years after leaving the coal mine. If a respiratory problem [were] to have happened due to coal dust inhalation it would have occurred much sooner than now." *Id.*

Background and Employment History

Claimant was the only witness to testify at the hearing. He was born in 1930 and was 76 years old at the time of the hearing. (DX 4, Tr. 12).

Claimant testified that he began working as an underground coal miner in 1952. (Tr. 13). He stated that he consistently worked in that field until 1974, when he ended his employment with Webster County Coal Corporation. *Id.* On cross-examination, he clarified that he may have only been employed with Webster County Coal until 1973.[9] (Tr. 20). Claimant explained that when he began his coal mine employment, he was trained to operate a shuttle car, which entails hauling coal from the face of the mine to the conveyer carrying it to the surface. (Tr. 14). The "face" of the mine, as noted by Claimant, is the working place where fresh ore or coal is exposed and being extracted. *See id.* The coal was loaded into the shuttle cars by machine, and Claimant was in close proximity as a shuttle car operator. *Id.* He described the work as "black, dirty, and nasty. A lot of dust." *Id.* Claimant worked as a shuttle car operator for less than one year. *Id.*

Claimant's next job involved maintenance and repair of mining machinery. (Tr. 15). Claimant testified that the machinery on which he would work was always located underground, at the face of the mine. *Id.* The working environment was much the same, insofar as it was "[d]ark, dusty hard work." *Id.* Although coal dust was visibly suspended in the air, Claimant testified that he was not required to wear any type of respiratory safety equipment, and he did not recall his employers ever offering him such equipment. (Tr. 15-16). Claimant continued work in this capacity, working at the face of the coal in machinery maintenance, until approximately

[9] The Social Security records confirm that his coal mine employment ended in 1973. (DX 9). According to those records, he was subsequently self-employed until 1997. *Id.*

1974, when he was last employed as a coal miner with Webster County Coal Corporation. (Tr. 15-16). Claimant stated that when he would finish a day of work, he would be coated in dark coal dust and would expel black coal dust upon blowing his nose. (*See* Tr. 18).

In the instant claim, Claimant filed a Form CM-913, signed by his daughter, which described his coal mine work and other employment. (DX 7). That form listed his last coal mine job title as "General Miner – Laborer/Fire Boss," and indicated that he worked at the face of the coal, operating machines, performing maintenance, and acting as a fire boss, as well as operating a shuttle car, loading machine, roof bolter, cutting machine, coal drill and unit mechanic. *Id.* It indicated that most of the work was performed in a humped position, neither sitting nor standing, but that there was limited lifting or carrying. *Id.* In connection with his previous claim, Claimant prepared his own Form CM-913, which indicated that he last work in maintenance/operating machines and that he had to lift and carry items weighing 30 pounds on a frequent basis (10 times per day and 15 times per day, respectively.) (DX 2). In the initial Form CM-913 Claimant filed for his first DOL claim, in 1979, he indicated that his last coal mine job was as a general coal miner (electrician, mechanic, fire boss, etc.) and he did not list any lifting requirements. (DX 1). He indicated that as a fire boss and face boss, he supervised 15 to 20 employees. *Id.* All three forms indicated that he had supervisory duties. (DX 1, 2, 7).

According to his testimony, Claimant first began experiencing breathing problems when he was involved in a Uniontown mine fire in 1954. (Tr. 16). Initially, he said that he would become "short winded and sometimes . . . out of breath." *Id.* He testified that the problems worsened and that presently, he is limited to walking approximately 100 yards before he encounters breathing difficulties. (Tr. 16-17). Claimant further testified that, although he is able to walk up and down stairs, doing so is bothersome. (Tr. 17). Additionally, in this hearing, Claimant asserted that "[he wakes] up every morning nearly almost strangled [and he will] cough up some phlegm." *Id.*[10] He also reported waking up and expectorating gray phlegm in the mornings for more than ten years. (Tr. 18).

Claimant testified that he began smoking before becoming a teenager and quit in 1975. (Tr. 18-19). This period of smoking constituted approximately 30 years. (*See id.*; DX 13). Although he began smoking cigarettes, he smoked exclusively cigars from age 16 onward. (Tr. 21). By the time he quit smoking, Claimant was smoking approximately 100 cigars per week. (Tr. 21).

Claimant receives medical treatment from the Veterans Administration [Department of Veterans Affairs] hospital. (Tr. 19). To the best of Claimant's recollection, he was prescribed an inhaler in 1998 to alleviate some of his breathing difficulties. *Id.* Claimant stopped using the inhaler in 2001. (Tr. 21). Claimant believes that he is still being treated by the hospital for breathing problems, but cannot confirm the purpose of his current medications. (Tr. 20-21).

Claimant has applied for Federal Black Lung Benefits previously, but has never applied for nor received Social Security disability payments. (Tr. 20).

[10] This testimony appears to contradict Claimant's report to Dr. Simpao at the time of the DOL examination, in which he stated that he would only cough up phlegm when he sleeps late on Sundays. (DX 13, CX 3).

Discussion

Evidentiary Limitations

My consideration of the medical evidence is limited under the regulations, which apply evidentiary limitations to all claims filed after January 19, 2001. 20 C.F.R. § 725.414. Section 725.414, in conjunction with section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. *Dempsey v. Sewell Coal Co.*, 21 BLR 1-47, BRB No. 03-0615 BLA (June 28, 2004) (en banc) (slip op. at 3), *citing* 20 C.F.R. §§ 725.414, 725.456(b)(1). Under section 725.414, the claimant and the responsible operator may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." *Id.*, *citing* 20 C.F.R. § 725.414(a)(2)(i), (a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by [the opposing party] and by the Director pursuant to § 725.406." *Id.*, *citing* 20 C.F.R. § 725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, may be received into evidence." *Id.*, *citing* 20 C.F.R. § 725.414(a)(4). Medical evidence that exceeds the limitations of section 725.414 "shall not be admitted into the hearing record in the absence of good cause." *Id.*, *citing* 20 C.F.R. § 725.456(b)(1). The parties cannot waive the evidentiary limitations, which are mandatory and therefore not subject to waiver. *Phillips v. Westmoreland Coal Co.*, 2002-BLA-05289, BRB No. 04-0379 BLA (BRB Jan. 27, 2005) (unpub.) (slip op. at 6).

The Benefits Review Board discussed the operation of these limitations in its en banc decision in *Dempsey*, *supra*. First, the Board found that it was error to exclude CT scan evidence because it was not covered by the evidentiary limitations and instead could be considered "other medical evidence." *Dempsey* at 5; *see* 20 C.F.R. § 718.107(a) (allowing consideration of medical evidence not specifically addressed by the regulations). However, in *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123, BRB No. 05-0335 BLA (Jan. 27, 2006) (en banc), the Board changed the position it took in *Dempsey* with respect to CT scan evidence and adopted the Director's position that "the use of singular phrasing in 20 C.F.R. § 718.107" requires "only one reading or interpretation of each CT scan or other medical test or procedure to be submitted as affirmative evidence." Second, the Board found that it was error to exclude pulmonary function tests and arterial blood gases derived from a claimant's medical records simply because they had been proffered for the purpose of exceeding the evidentiary limitations. *Dempsey* at 5. Third, the Board held that state claim medical evidence is properly excluded if it contains testing that exceeds the evidentiary limitations at § 725.414. In so holding, the Board noted that such records did not fall within the exceptions for hospitalization or treatment records or for evidence

from prior federal black lung claims. *Id.* Fourth, on the issue of good cause for waiver of the regulations, the Board noted that a finding of relevancy would not constitute good cause and therefore records in excess of the limitations offered on that basis, and on the basis that the excluded evidence would be "helpful and necessary" for the reviewing physicians to make an accurate diagnosis, were properly excluded. *Id.* at 6. Finally, the Board stated that inasmuch as the regulations do not specify what is to be done with a medical report that references inadmissible evidence, it was not an abuse of discretion to decline to consider an opinion that was "inextricably intertwined" with excluded evidence. *Id.* at 9. Referencing *Peabody Coal v. Durbin*, 165 F.3d 1126, 21 B.L.R. 2-538 (7th Cir. 1999), the Board acknowledged that it was adopting a rule contrary to the common law rule allowing inadmissible evidence to be considered by a medical expert, because "[t]he revised regulations limit the scope of exert testimony to admissible evidence." *Dempsey* at 9-11.

In *Brasher v. Pleasant View Mining, Inc.*, BRB No. 05-0570 BLA (BRB April 28, 2006) (slip op. at 6), the Board noted that, where a physician's reports constitute two separate written assessments of the miner's pulmonary condition at two different times, an administrative law judge may properly decline to consider them as a single medical report under the evidentiary limitations.

I find that the evidence in the instant claim is in compliance with the evidentiary limitations. Although the report by Dr. Selby references medical records that are not in the record, as discussed above, such medical records would be admissible as hospitalization or treatment records and are not covered by the evidentiary limitations. *See generally Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-98 (2006) (en banc) (discussing broad discretion by administrative law judge in resolving evidentiary issues).

The documents from the prior claims were admitted into evidence as DX 1 and DX 2. Section 725.309(d)(1) provides that "any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim." Additionally, in *Church v. Kentland-Elkhorn Coal Corp.*, BRB Nos. 04-0617 BLA and 04-0617 BLA (Apr. 8, 2005)(unpub.), the Board stated that "as noted by the Director, when a living miner files a subsequent claim, all evidence from the first miner's claim is specifically made part of the record." Therefore, all evidence relating to the prior claim is admissible.

Subsequent Claims Analysis

The instant case is a subsequent claim, because it was filed more than one year after the prior denial of benefits in December, 1997. *See* § 725.309(d). Previously, such a claim would be denied based upon the prior denial unless the Claimant could establish a material change in conditions. *See* 20 C.F.R. § 725.309(d). The Sixth Circuit Court of Appeals held that to find a material change in conditions has occurred between an earlier denial of a claim under the Act and a subsequent claim, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner employee has proven at least one of the elements of entitlement previously adjudicated against him. *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 559 (6th Cir. 2002), *citing Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98

(6th Cir. 1994). If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. *Id*. Then the administrative law judge must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits. *Id.*

The amended regulations have replaced the "material change in conditions" standard with the following standard:

> (d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (*see* § 725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. **A subsequent claim** shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part except that the claim **shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement** (*see* §§ 725.202(d)("miner"), 725.212 ("spouse"), 725.218 ("child"), and 725.222 ("parent," "brother," or "sister")) **has changed since the date upon which the order denying the prior claim became final**.[11] The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
>
> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
>
> (2) For purposes of this section, **the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based.** For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
>
> (3) **If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement** . . .
>
> (4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (*see* § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim . . . . [Emphasis added]

[11] For a miner, the conditions of entitlement include whether the individual (1) is a miner as defined in the section; (2) has met the requirements for entitlement to benefits by establishing pneumoconiosis, its causal relationship to coal mine employment, total disability, and contribution by the pneumoconiosis to the total disability; and (3) had filed a claim for benefits in accordance with this part. 20 C.F.R. § 725.202 (d) *Conditions of entitlement: miner*.

20 C.F.R. § 725.309(d) (2003). Thus, it is necessary to look at the new evidence relating to each medical condition of entitlement upon which the denial was premised to determine whether it establishes that condition of entitlement.

The prior claim (of September 12, 1997) was denied because the medical evidence failed to establish the existence of pneumoconiosis, its causal relationship with coal mine employment, total disability, and contribution of pneumoconiosis to total disability. (DX 2). Establishment of any one of these elements would therefore reopen the claim and subject it to consideration of the merits.

Existence of Pneumoconiosis

To prevail in a claim for Black Lung benefits, a claimant miner must establish that he or she suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he or she is totally disabled, as defined in section 718.204; and that the total disability is due to pneumoconiosis. 20 C.F.R. §§ 718.202 – 718.204. The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Greenwich Collieries*, the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. *See id.* Thus, in order to prevail in a black lung case, a claimant must establish each element by a preponderance of the evidence.

Under 20 C.F.R. § 718.202(a)(1)-(4), a finding of pneumoconiosis can be made based upon x-ray evidence, biopsy or autopsy evidence, presumption, or the reasoned medical opinion of a physician based on objective medical evidence. The United States Court of Appeals for the Sixth Circuit has often approved of the independent application of the subsections of section 718.202(a) to determine whether claimant has established the existence of pneumoconiosis. *See Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002) (en banc).

In the December 2000 amendments to the regulations, the definition of pneumoconiosis in section 718.201 has been amended to provide for "clinical" and "legal" pneumoconiosis and to acknowledge the latency and progressiveness of the disease. Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconiosis: the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment (such as coal worker's pneumoconiosis or silicosis). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment" and "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. § 718.201(b). Even if a physician states a claimant is not suffering from clinical pneumoconiosis, the evidence must be examined in light of the broader legal definition of pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000).

X-ray Evidence. Claimant has failed to establish pneumoconiosis by a preponderance of the x-ray evidence submitted in connection with this claim, which is summarized above. The record includes three interpretations of the x-ray submitted in conjunction with the instant claim,

one of which only addressed the quality of the film (which all physicians agree is good). The remaining two x-ray interpretations are directly conflicting: Dr. Simpao noted small opacities throughout three pulmonary zones and diagnosed Claimant with coal worker's pneumoconiosis Category 1/0, whereas Dr. Broudy reported that the lung zones were free from any opacities and categorized the x-rays as Category 0 or negative for pneumoconiosis.

In determining the existence of pneumoconiosis based on chest x-ray evidence, "where two or more x-ray reports are in conflict, in evaluating such x-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays." 20 C.F.R. §718.202(a)(1). The Board has held that it is proper to accord greater weight to the interpretation of a B-Reader or Board-certified radiologist over that of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983). Similarly, an interpretation by one who is both a duly-qualified B-Reader and Board-certified radiologist may be accorded greater weight than that of a B-Reader alone. *See Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984).

Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. *Clark v. Kart-Robbins Coal Co.*, 12B.L.R. 1-149 (1989) (en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In the case of x-ray evidence, more recent positive evidence may be credited over older negative evidence, but the Benefits Review Board has stated that "it is irrational to credit the most recent evidence strictly on the basis of its chronology, if that evidence is negative for pneumoconiosis." *Chaffin v. Peter Cave Coal Co.*, 22 B.L.R. 1-294, 1-302 (BRB 2003).

Applying these principles to the new x-ray evidence before me, I find that it does not support a finding of coal worker's pneumoconiosis.

There are three interpretations of record relating to the November 13, 2001, x-ray (the only new x-ray) and one new reading of the September 30, 1997 x-ray. Dr. Simpao interpreted the November 13, 2001 x-ray as positive and diagnosed coal worker's pneumoconiosis, Category 1/0, p/p. Dr. Broudy (a B-Reader) examined the same x-ray, found no opacities or abnormalities consistent with pneumoconiosis, and interpreted it as completely negative. Finally, Dr. Sargent's reading was for quality only and, as such, is not evidence of either the presence or absence of pneumoconiosis. In view of Dr. Broudy's superior qualifications, I find that this x-ray is negative for pneumoconiosis. Dr. Broudy also reached the same conclusions with respect to the September 30, 1997, x-ray.[12] Thus, I find that the new x-ray evidence is negative for pneumoconiosis.

Autopsy or Biopsy Evidence. As there is no autopsy or biopsy evidence of record, Claimant has failed to establish the presence of the disease under 20 C.F.R. § 718.202(a)(2).

[12] In connection with the last claim, Dr. Simpao read the September 30, 1997, x-ray as positive for pneumoconiosis, p/p type opacities, 1/0 profusion, in four zones but the x-ray was read as completely negative by dually qualified reader Dr. Sargent. (DX 2.) Dr. Sargent also performed the quality interpretation for the 2001 x-ray. (DX 13).

Complicated Pneumoconiosis and Other Presumptions. A finding of opacities of a size that would qualify as "complicated pneumoconiosis" under 20 C.F.R. § 718.304 results in an irrebuttable presumption of total disability. As there is no evidence of complicated pneumoconiosis, the section 718.304 presumption is inapplicable. The additional presumptions described in section 718.202(a)(3), which are set forth in 20 C.F.R. §§ 718.305 and 718.306 are also inapplicable, inter alia, because they do not apply to claims filed after January 1, 1982 or June 30, 1982, respectively. Further, section 718.306 does not apply, because the claim is not for death benefits. Thus, Claimant has failed to establish the presence of pneumoconiosis under 20 C.F.R. § 718.202(a)(3).

Medical Opinions on Pneumoconiosis. The medical opinions submitted in conjunction with the instant claim do not, by a preponderance of the evidence, establish pneumoconiosis. In addition to the x-ray interpretations discussed above, the following physicians provided medical opinions addressing the issue of whether Claimant has pneumoconiosis: (1) Dr. Valentino S. Simpao, the DOL examiner; and (2) Dr. Jeff W. Selby, Employer's reviewing physician (who did not actually examine Claimant). Their opinions are discussed in detail above. Summarily, Dr. Simpao found that the Claimant suffered from clinical pneumoconiosis and Dr. Selby found that he did not.

Factors to be considered when evaluating medical opinions include the reasoning employed by the physicians and the physicians' credentials. *See Millburn Colliery Co. v. Hicks*, 138 F.3d 524, 536 (4th Cir. 1998). A doctor's opinion that is reasoned, documented, supported by objective medical tests, and consistent with all the documentation in the record, is entitled to greater probative weight. *See Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data on which the physician based the diagnosis, and a "reasoned" opinion is one in which the underlying documentation is adequate to support the physician's conclusions. *Id.* It is proper to discredit a medical opinion based on an inaccurate length of coal mine employment. *Worhach v. Director, OWCP*, 17 B.L.R. 1-105 (1993) (per curiam).

As noted above, pneumoconiosis is defined under the Act as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment . . . [including] both medical or "clinical" pneumoconiosis and statutory, or "legal," pneumoconiosis. Consequently, a claimant may prove the existence of pneumoconiosis under the Act by establishing that he or she has either clinical or legal pneumoconiosis. The distinct definitional difference between the two is detailed above, as well.

Clinical Pneumoconiosis. Claimant has failed to meet his burden of establishing the existence of clinical pneumoconiosis. In this regard, Dr. Simpao diagnosed Claimant with "CWP 1/0" (i.e. coal worker's pneumoconiosis of 1/0 profusion), or clinical pneumoconiosis, while Dr. Selby found that Claimant did not suffer from either coal workers' pneumoconiosis or any other occupational dust disease of the lungs. While citing to other test results and examination findings, Dr. Simpao's diagnosis of coal worker's pneumoconiosis was based in large part upon his own interpretation of the chest x-ray, described above. However, as noted above, Dr. Broudy, a more qualified x-ray reader, found insufficient evidence to support a diagnosis of coal worker's pneumoconiosis on either the 2001 x-ray or a previous (1997) x-ray.

In view of Dr. Broudy's superior credentials for reading x-rays due to his status as a B-reader, I have accepted Dr. Broudy's assessment, as discussed above. Dr. Selby based his finding of no CWP or other occupational lung disease in part upon Dr. Broudy's negative reading and the other negative readings in the medical records he reviewed. Although not all of these other readings are of record, it is clear that the only positive readings of record are by Dr. Simpao (in connection with this claim and the last claim), and the x-rays he interpreted as positive have been reread as negative by more qualified readers.

Dr. Simpao also noted that Claimant's pulmonary test results, and specifically the reduced FEV1/FVC ratio and midflows, may indicate the presence of a small airway disease (DX 13, CX 3); however, Dr. Selby analyzed the same data and disputed Dr. Simpao's conclusions (EX 2). In this regard, Dr. Selby advised that the American Thoracic Society guidelines "recommend not using small airways values when the FVC, FEV1,[and] FEV1/FVC ratio are normal." (EX 2). It is unclear what, exactly, Dr. Selby means, particularly since the FEV1 and FEV1/FVC values, while far from qualifying, are not entirely normal. In this regard, while the FVC value was 97% of the expected, the FEV1 value was 85% of the expected value and the FEV1/FVC ratio was 86% of the expected value. Nevertheless, Dr. Selby disagrees with Dr. Simpao's conclusions about what the pulmonary function tests show and determined that there was no impairment. His opinion is entitled to some additional weight because, even though he did not examine the Claimant, he is a board-certified pulmonologist while Dr. Simpao's credentials are not apparently of record.

Thus, Dr. Simpao's opinion has little more than reported symptoms to support it. Claimant's pulmonary function tests are near normal, his arterial blood gas is normal, and a qualified B-Reader reported his chest x-ray as clear and free of any indications of pneumoconiosis. In sum, Dr. Simpao's diagnosis of pneumoconiosis is not well reasoned and documented. Accordingly, Claimant has not established that he contracted clinical pneumoconiosis by a preponderance of the medical opinion evidence.

Legal Pneumoconiosis. The issue of legal pneumoconiosis is broader, but Claimant has failed to satisfy his burden. A pulmonary disease or impairment may constitute statutory pneumoconiosis if it is significantly related to or aggravated by dust exposure in coal mine employment. The legal definition of pneumoconiosis is broad and may encompass any respiratory or pulmonary condition that has been caused or contributed to by coal mine dust exposure provided that the contribution is significant. Notably, in amending the regulations in December 2000, the Department of Labor discussed the strong epidemiological evidence supporting an association between coal dust exposure and obstructive pulmonary disability (65 Fed. Reg. 79937-79945 (Dec. 20, 2000)), but it nevertheless chose to require that each individual claimant establish by a preponderance of the evidence that such an association occurred in that individual's case. *Id.* at 79938. Claimant has not made the required showing here.

The only physician to find any form of occupational pneumoconiosis or impairment in the instant case was Dr. Simpao; however, Dr. Simpao has not diagnosed Claimant with any disease that falls within the accepted criteria for legal pneumoconiosis. On his examination form, Dr. Simpao's only diagnosis was coal worker's pneumoconiosis, category 1/0. When discussing the etiology of that diagnosis, Dr. Simpao stated: "multiple years of coal dust

exposure is medically significant in his pulmonary impairment." *Id.* The diagnosis of CWP is used for a designation of *clinical* pneumoconiosis: "physicians generally use 'pneumoconiosis' as a *medical or clinical* term that comprises merely a small subset of the afflictions compensable under the Act." *Barber v. Director, OWCP*, 43 F.3d 899 (4th Cir. 1995). As such, administrative law judges must also determine if other pulmonary diseases and impairments reported by the physician may fall within the larger legal definition. *See id.* However, Dr. Simpao's only diagnosis is that of coal worker's pneumoconiosis. Indeed, in the March 22, 2005, letter following Judge Roketenetz's Order of Remand, the District Director specifically requested: "[p]lease provide a reasoned medical opinion stating if [Claimant] has a chronic lung disease . . . [if so,] please advise whether [the] diagnosis represents clinical pneumoconiosis and/or legal pneumoconiosis." (DX 23). Dr. Simpao's response, wholly excerpted above, again only references his diagnosis of coal worker's pneumoconiosis. (DX 23, CX 4).

Dr. Selby reported that Claimant's November, 2001, test results do not indicate the presence of any pulmonary impairment. Likewise, he has not diagnosed pneumoconiosis.

In view of the above, putting aside the issue of clinical pneumoconiosis (discussed above), Claimant has not been diagnosed with "any chronic lung disease or impairment . . . arising out of coal mine employment," as required by section 718.201(b) to establish legal pneumoconiosis. As such, he has failed to meet his burden and has not established the existence of legal pneumoconiosis.

In view of the above, I find that Claimant has not met his burden and has not produced the medical opinions necessary to establish the existence of either clinical or legal pneumoconiosis.

Other Evidence of Pneumoconiosis. There is no other evidence on the issue of pneumoconiosis. Although medical records have been referenced, copies of the records themselves have not been admitted into evidence.

All Evidence of Pneumoconiosis. As this case arises in the Sixth Circuit, it would be sufficient if the new evidence established the presence of pneumoconiosis under any of the individual subsections of section 718.202(a); however, it fails to do so. Taking into consideration the new evidence on the issue of the existence of pneumoconiosis, I find that the Claimant cannot establish pneumoconiosis as defined by the regulations under the newly submitted evidence. Accordingly, this claim cannot be reopened based upon a finding of pneumoconiosis.

Causal Relationship

In order for a claimant to be found eligible for benefits under the Act, it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b). Although the parties have stipulated that Claimant was engaged in coal mine employment for

more than ten years (specifically, 18 years), I have also found that he has failed to establish pneumoconiosis based upon the newly submitted evidence in connection with this claim. He is therefore not entitled to the presumption under § 718.203 nor has he directly shown a causal relationship between pneumoconiosis and coal mine employment.

Total Disability

The regulations as amended provide that a claimant can establish total disability by showing that pneumoconiosis prevented the miner "[f]rom performing his or her usual coal mine work," and "[f]rom engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." 20 C.F.R. § 718.204(b)(1). Where, as here, there is no evidence of complicated pneumoconiosis, total disability may be established by pulmonary function tests, arterial blood gas tests, evidence of cor pulmonale with right sided congestive heart failure, or physicians' reasoned medical opinions, based on medically acceptable clinical and laboratory diagnostic techniques, to the effect that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in the miner's previous coal mine employment or comparable work. 20 C.F.R. § 718.204(b)(2). For a living miner's claim, it may not be established solely by the miner's testimony or statements. 20 C.F.R. § 718.204(d)(5).

Based upon the newly submitted medical evidence and his testimony, I find that Claimant has not established total disability under § 718.204(b).

Pulmonary Function Tests. As summarized above, pulmonary function tests were taken on November 13, 2001. The federal standards one must meet in order to qualify as "totally disabled" under the statute are listed in Appendix B to Part 718. Specifically, for a male of Claimant's height (72 inches) and age (71) at the time of testing, the following standards apply to pulmonary function tests:

- A showing of FEV1 values equal to or less than 2.04, AND
    - FVC values equal to or less than 2.63, or
    - MVV values equal to or less than 82, or
    - FEV1/FVC ratio of equal to or less than 55%.

20 C.F.R. 718.204(b)(2)(i), Appendix B.

While Dr. Simpao notes that these values may indicate a respiratory impairment, Claimant's FEV1 value, FVC value, and FEV1/FVC ratio do not fall within the prescribed ranges qualifying him as totally disabled. Accordingly, based upon the requirements in Part 718, Appendix B, I find that the preponderance of the pulmonary function tests do not support a finding of total disability under § 718.204(b)(2)(i).

Arterial Blood Gases. Additionally, Claimant has failed to establish total disability through new arterial blood gas studies under § 718.204(b)(2)(ii), based upon the November 13, 2001, study. For an arterial blood gas study performed between 0 and 2999 feet above sea level, an individual with Claimant's arterial pCO2 level (44.6 mm Hg) must show a pO2 level of 60

mm Hg or below. 20 C.F.R. Part 718, Appendix C. Claimant's pO2 level was 91.8 mm Hg, which is entirely normal according to the printed report. (DX 13, CX 3). Moreover, Dr. Simpao noted that these results indicate a normal arterial blood gas (DX 13, CX 3). While no exercise arterial blood gas studies were administered, this was due to Claimant's unrelated knee and leg problems, as well as a history of myocardial infarction. Thus, these results do not provide a basis for determining Claimant's ability to perform strenuous work. Nevertheless, they do not support a finding of any pulmonary or respiratory disability.

Based on the arterial blood gases taken, Claimant's test results do not fall within the regulatory standards required for a showing of total disability under § 718.204(b)(2)(ii)..

Cor pulmonale with right-sided congestive heart failure. There is no evidence of cor pulmonale or congestive heart failure, so Claimant has not established total disability under §718.204(b)(2)(iii).

Medical opinion evidence on total disability. The medical opinion evidence does not establish total disability. There are two medical opinions addressing the issue of total disability, by Dr. Simpao and Dr. Selby. (DX 13, CX 3; EX 2).

Notwithstanding the nonqualifying testing, Dr. Simpao stated that Claimant was totally disabled. (DX 13, CX 3). This issue was central to Judge Roketenetz's August 26, 2004, Order of Remand, which states in pertinent part:

> Dr. Simpao's total disability diagnosis is not well-reasoned. He does not discuss the Claimant's non qualifying pulmonary function and arterial blood gas testing or how they support total pulmonary disability. . . . Dr. Simpao notes increased resonance, occasional expiratory wheezes and crepitation upon evaluation of the chest, but fails to explain how they contribute to a finding of total disability. The Claimant's self-reported symptomatology, in and of itself, is insufficient to support a finding of total disability.

(DX 23).

As a consequence of this Order, the District Director's March 22, 2005, letter afforded Dr. Simpao an opportunity to clarify his total disability diagnosis. In his March 31, 2005, response (reprinted in its entirety above), Dr. Simpao states "[Claimant] is totally disabled due to his pulmonary and cardiac impairment," without further explaining how the diagnosed respiratory impairment would prohibit Claimant from performing his work as a mine supervisor. (DX 23, CX 4). He offers no explanation of how he came to categorize Claimant as totally disabled, notwithstanding the nonqualifying testing, nor how the documentation and test results support that conclusion.

Based upon the same testing, Dr. Selby's report, however, found no pulmonary or respiratory impairment and no disability. After reviewing the same pulmonary function tests, Dr. Selby opined that "[Claimant] has the respiratory and pulmonary capacity to perform any and all prior coal mine duties, including his last day at the mines working as a mine superintendent in 1972." (EX 2).

A report may be properly discredited when the physician does not explain how the underlying documentation supports his or her diagnosis. *Duke v. Director, OWCP,* 6 BLR 1-673 (1983). In the instant case, Dr. Simpao categorized the impairment as "mild" on his report, but also opined that Claimant was "totally disabled." His report and March 31, 2005, response to the District Director's request for clarification do not address the issue of total pulmonary or respiratory disability. Inasmuch as he fails to explain how the documentation supports this diagnosis, Dr. Simpao's total disability opinion does not constitute a credible diagnosis.

Therefore, I find that the preponderance of the medical opinion evidence does not support a finding of total disability and Claimant has not met his burden of establishing total disability under Section 718.204(b)(2)(iv).

Section 718.204(b)(2) as a whole. Claimant has failed to establish total disability under any of the four provision allowed by the regulations. His pulmonary function tests and arterial blood gases were within the normal ranges listed in Appendix B to Part 718.204. Additionally, Dr. Simpao's total disability diagnosis is not well-reasoned. Even if Claimant's job in the coal mines is deemed to have involved heavy or strenuous work, there is simply no objective evidence of record that would substantiate a finding of a pulmonary or respiratory impairment that would prevent him from performing such work. Therefore, Claimant has not established a change of conditions as related to the "total disability" condition of entitlement.

Contribution of Pneumoconiosis to Total Disability

Having found that Claimant failed to establish either the existence of pneumoconiosis or that he is totally disabled based upon the new evidence, Claimant is unable to prove a change in condition as it relates to the contribution of pneumoconiosis to total disability.

My analysis would end here, were it not that the issue of subsequent claims was not raised by either party and was not listed as an issue. For the reasons discussed above, I will proceed to consideration of the claim on the merits, based upon all of the evidence of record.

Merits of the Claim

Based upon the evidence designated by the parties, this claim must fail, for the reasons set forth above. Claimant simply cannot establish any of the elements of entitlement based upon the evidence submitted in connection with the instant claim.

As this is a subsequent claim, however, the evidence from the two prior claims must also be taken into consideration if this claim is considered on the merits. 20 C.F.R. §725.309. Extended discussion is unnecessary as it is clear that Claimant cannot establish total disability when all of the evidence of record is taken into consideration.

There were three previous pulmonary function tests taken on March 28, 1973 (DX 1), December 5, 1979 (DX 1), and September 30, 1997 (DX 2). None of the tests produced qualifying values. It is worth noting that the FEV1 and FVC results for the September 30, 1997

test were actually worse than for the November 13, 2001 pulmonary function test, producing an FEV1 of 2.91 (78% of predicted), an FVC of 4.12 (84% of predicted), and an MVV of 101, none of which values are qualifying, however. (DX 2). Dr. Simpao interpreted the September 1997 results as showing a reduced flow volume curve along with reduced mid and peak flows and he stated that the test indicated a mild degree of obstructive airway disease. *Id.*

None of the previous arterial blood gases were qualifying. The ABGs taken on January 12, 1980 produced resting pCO2 and pO2 values of 43 and 72, respectively, that improved to 33 and 107, respectively, with two minutes of exercise. (DX 1). Dr. William H. Getty, who reported the results, noted that Claimant did not show any real dyspnea during the exercise portion of the test, although he "had some deep sighing breaths that he took frequently" and he complained that his legs were tired. *Id.* The September 30, 1997 ABGs were taken only at rest, producing nonqualifying pCO2 and pO2 values of 41.5 and 79.4, respectively. (DX 2). Dr. Simpao noted that the resting ABGs were within normal limits. *Id.*

There is only one medical examination report previously of record – the report by Dr. Simpao relating to the September 30, 1997 examination. (DX 2). Dr. Simpao diagnosed "CWP 1/0" at that time but characterized the impairment as "Moderate." *Id.* While he checked the box indicating that the Claimant lacked the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment, he provided no rationale, apart from citing to "objective findings on the chest x-ray, arterial blood gas and pulmonary function test along with symptom[a]tology and physical findin[g]s as noted in the report." *Id.* He provided no further explanation. This conclusory report, like the subsequent one by Dr. Simpao, does not establish total disability.

Taking the evidence from the previous claims into account, considering it along with the evidence from the current claim, it is clear that Claimant cannot establish that he is totally disabled on a pulmonary or respiratory basis under the regulations. He has not established that he is incapable of performing his last coal mine employment due to a pulmonary or respiratory impairment, even assuming that his previous coal mine employment was heavy in nature.

CONCLUSION

Because Claimant has failed to establish a change in conditions as per the requirements of 20 C.F.R. § 725.309, there is no basis for reopening this subsequent claim. However, if this claim is considered on the merits, it must fail because Claimant cannot establish that he is totally disabled under the regulations, which is an essential element of a claim for black lung benefits. His claim for benefits must therefore be denied, and it is unnecessary to consider any other issues.

ORDER

IT IS HEREBY ORDERED that the claim of Claimant E.F. for black lung benefits be, and hereby is, **DENIED**.

A

PAMELA LAKES WOOD
Administrative Law Judge

Washington, DC

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the District Director's office. *See* 20 C.F.R. §§725.458 and 725.459. The address of the Board is:

Benefits Review Board
U.S. Department of Labor
P.O. Box 37601
Washington, DC 20013-7601

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207.

Once an appeal is filed, all inquiries and correspondence should be directed to the Board. After receipt of an appeal, the Board will issue a notice to all parties acknowledging the receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to:

Allen H. Feldman, Associate Solicitor, Black Lung and Longshore Legal Services
U.S. Department of Labor
200 Constitution Ave., NW
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See 20 C.F.R. § 725.481